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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD (PARTIAL)** OF THE 439th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 10 June 1991, at 10.30 a.m.

Temporary Chairman: Mr. BERGSTEN (Secretary of the Commission)

Chairman: Mr. SONO (Japan)

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* No summary records were issued for the 426th to 438th meetings.

** No summary record was prepared for the rest of the meeting.

This record is subject to correction.

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The discussion covered in the summary record began at 11.10 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 1

1. The CHAIRMAN suggested that the Commission should proceed immediately to a detailed discussion of the draft Model Law taking it article by article, and should touch upon general policy issues only in so far as they related to specific provisions in the text.

2. Mr. BURMAN (United States of America) said that, although his delegation agreed in principle with the footnote to article 1 of the draft Model Law, it had proposed an amendment to that footnote for the purpose of clarifying issues which were currently obscure. It was unclear, for instance, whether the existing text of the footnote meant that the draft Model Law applied to consumers unless the internal laws of a particular State otherwise governed the transaction. Furthermore, in its current form, the footnote gave no indication whether, in cases where the consumer-protection laws of a State conflicted with provisions in the draft Model Law in some respects only, the draft Model Law would apply to parts of a credit transfer and the State's consumer-protection laws to other parts of the transaction.

3. As for his delegation's concerns about article 1(1), he preferred to postpone discussion of the matter until various other relevant provisions had been discussed.

4. The CHAIRMAN said that it had not been the intention of the Working Group on International Payments to restrict the scope of consumer-protection legislation to the extent advocated by the United States amendment, i.e. to transactions between the originator and the originator's bank, on the one hand, and between the beneficiary and the beneficiary's bank, on the other.

5. Mr. IWAHARA (Japan) said that the proposed amendment to the footnote to article 1 might give rise to difficult questions of policy in individual States. In article 16, paragraphs 1 and 5, and elsewhere, the draft Model Law dealt with the liability relationship between parties not engaging in direct transactions with one another. If countries were forbidden to enact special regulations concerning such liability relationships for the purpose of protecting consumers, that would discourage them from adopting the draft Model Law. If local consumer-protection laws governing relationships between the originator and receiving banks other than the originator's bank or between the beneficiary and sending banks were to be forbidden, then the Model Law should itself provide for consumer protection, an area which he understood had been expressly excluded from its scope.

6. Mr. GRIFFITH (Observer for Australia) said that there was no need to amend the footnote to article 1 since, as it stood, it clearly indicated that a State's consumer-protection laws should indeed apply to parts of a credit transfer transaction and the draft Model Law to other parts.

7. Mr. DUCHEK (Observer for Austria) said he shared the doubts expressed by the representatives of Japan and Australia. The applicability of national consumer-protection laws should not be diminished by the operation of the Model Law; States adopting the Model Law, or acceding to a convention if the Model Law should take that form, must be able to enact their own consumer-protection laws as they deemed necessary and apply them to international credit transfers. The matter contained in the footnote might better appear somewhere in the text of the articles themselves so as to make it clear that consumer-protection laws would not be affected.

8. The proposed amendment would seem to indicate that the consumer-protection laws of a State should prevail, as far as the relationship between the originator and the originator's bank was concerned, only if the two parties were situated in the same State. However, that might not be the case and, according to private international law, the law of the consumer's State was decisive. Since the amendment would thus appear to run counter to the trend of private international law, he had some technical reservations. A further problem concerned the relations with third parties, which might also be regulated by consumer-protection law.

9. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the text of article 1 should be left as it stood in the Model Law.

10. Mr. ERIKSSON (Observer for Sweden) said that the footnote to article 1 should be left unchanged. Adoption of the amendment would lead to serious problems in the matter of the protection of consumers. There would, for instance, be a number of difficult questions in the event that more than one bank in the chain of transactions was situated in a country with special consumer protection rules, where the consumer was also located.

11. As for the question of a conflict between the Model Law and the consumer-protection laws of a particular State, it was quite clear that, unless there were special consumer-protection regulations in the country concerned that dealt with the specific problem, it would be resolved according to the rules contained in the Model Law.

12. Mr. BURMAN (United States of America) said that the will of the Commission seemed to be clear; however, with regard to the subject under discussion and to other articles it had yet to consider, he hoped that there would be general agreement that the fundamental purpose of the Commission was to facilitate international trade by removing the impediments created by conflicting national provisions and, perhaps, by establishing special international rules. The interests of consumers had, of course, to be taken into account. In view of the difficulties created by uncertainty as to what laws would apply to a given commercial transaction, his delegation considered that it was the Commission's task to create predictability and certainty for the commercial parties. That aspect would, he hoped, be taken into account as the Commission's work proceeded since such an approach would result in great benefits to all the Member States.

13. The CHAIRMAN, having thanked the representative of the United States for his co-operative and constructive attitude, said that, although his amendment was not generally accepted, there was a feeling in the meeting that the protection of consumers was important.

14. The United States proposal was also related to the sphere of application of the article - whether it should cover only international transactions or both domestic and international transactions. In the latter case, he assumed that the delegation of the United States would prefer that certainty be maintained, both the beneficiary side and the originating side being subjected to local autonomy, and would agree that the protection of consumers should fall under local jurisdiction. Even if it were thought that certain segments of the total transaction should be excluded from consumer protection, that principle could not be imposed through the Model Law. It was clear that the aim should be to create certainty in the legal relationships involved in the credit transfer system.

15. The footnote, as currently drafted, was the result of a long debate. It was a neutral statement of a fact and was not intended to encourage local intervention. In the circumstances, he hoped that the United States representative would not insist on his amendment.

16. He had noted the suggestion by the observer for Austria that the matter contained in the footnote be included in the actual text of the Model Law, but hoped that the suggestion would not be pursued.

17. Turning to article 1(1), he noted the United States proposal to make the Model Law applicable to both the domestic and the international parts of credit transfers. While the comments he had heard indicated that such an approach might not attract much support, it should none the less be understood that expansion of the scope of the Model Law would not necessarily be excluded.

18. Mr. BHALA (United States of America) said that he agreed with the Chairman's thinking. In the case of the test for internationality, it might not be possible to solve all the difficulties at the current session. The division of a credit transfer into an international part and a domestic part raised both conceptual and operational difficulties. Any such test was bound to be formalistic and might therefore be either under-inclusive or over-inclusive.

19. In fact, the test as currently worded might be the best that could be expected. He would, however, like to see the matter discussed in the commentary on the draft Model Law which would, he hoped, reflect his delegation's concerns.

20. Mr. SCHNEIDER (Germany) drew attention to a problem concerning the Member States of the European Economic Community. The intended creation of a single internal market would eliminate the distinction between cross-border and domestic transactions within the Community. The possibility of issuing an EEC directive incorporating the Model Law was under discussion. In that event, all transfers within the Community would be subject to the Model Law.

(Mr. Schneider, Germany)

21. Secondly, although the Working Group had noted the global nature of international payments, national laws still existed and it was desirable that they should continue to do so. It was therefore necessary to decide whether a chain of contracts should be governed by a single law, or whether different parts of the chain should be governed by different laws. However that might be, it was by no means unlikely that full harmonization would not be achieved because some countries would, unfortunately, decide not to adopt the Model Law. As it was possible, therefore, to deal only with specific parts of the chain, he preferred to retain the existing text.

22. The CHAIRMAN suggested that, in respect of internal European Economic Community rules, an approach might be adopted similar to that in the 1980 United Nations Convention on Contracts for the International Sale of Goods which stated (article 94) that two or more contracting States having the same or closely related rules might be excluded.

23. Ideally, as advocated by the representative of the United States, international transfers should be governed by global rules. For the time being, however, as the representative of Germany had pointed out, national laws predominated. Those two views did not necessarily reflect a contradiction in philosophy but simply constituted different approaches to current realities.

24. He assumed that the Commission would adopt the approach of distinguishing between international and domestic transfers, as clearly implied in article 1(1). As indicated in the Secretariat's comments on the article (A/CN.9/346, pp. 6-9), States would still be free to extend the scope of the Model Law by applying it to international and domestic transfers.

25. Mr. GRIFFITH (Observer for Australia) said he agreed that there should be an option of applying the Model Law to domestic transfers. It might be useful if that idea were included in a footnote or commentary to the Model Law, so that those persons not attending the session of the Commission might become aware of it.

26. Mr. VASSEUR (Banking Federation of the European Community) said that the members of his Federation would wish the Model Law to apply solely to electronic credit transfers. He shared the concern of the representative of the United States arising from the significant differences between low-cost, high-speed electronic credit transfer systems and other methods of transfer involving telex, documents and the like. The Working Group had decided not to make any distinction but had suggested that, if necessary, special rules for non-electronic transfers could be drawn up. He asked for confirmation that the current text, which made no distinction between the different types of transfer, was intended to apply to all transfers of funds.

27. The CHAIRMAN said that, although the Working Group had, at one stage, concerned itself only with electronic credit transfers, it had come to realize that most of the rules would apply to all types of transfer of funds. It had therefore considered the application of the rules to all transfers of funds.

(The Chairman)

Nevertheless, it was only because of the development of electronic credit transfer systems in the 1970s that the current draft Model Law had been developed. However, since it was a Model Law, Member States were perfectly free to adopt it for electronic credit transfers only.

28. Mr. ABASCAL ZAMORA (Mexico) said that the restriction to electronic credit transfers had been eliminated for various reasons. In the first place, it was difficult to distinguish between electronic and other types of transfer since, in practice, a transfer might be made in part electronically and in part by other means. It has also been thought desirable to eliminate any preference for a particular type of technology, which might preclude other forms to be developed in the future. High-speed electronic credit transfers were extremely difficult to define. It had therefore been decided that the draft Model Law should cover all transfers of funds.

29. Mr. BURMAN (United States of America) said that since the issue of the distinction between electronic fund transfer (EFT) and all other forms of transfer had been raised, he had some general comments to make, even though the subject had been discussed in the Working Group.

30. The Working Group had taken on an extremely difficult task and the ultimate fruit of its labours might prove unacceptable in practice to the commercial community if the Commission insisted on trying to combine two very different types of transactional environments which would be better served by two different sets of rules.

31. The question was not just one of speed, like, for example, the difference between a motor car driving along a motorway and a bicycle proceeding slowly and steadily with time for checking, notifying and so forth. What really distinguished electronic banking from the traditional banking world was the extremely high volume made possible by computer-assisted international banking, which had created a very different environment for the transfer of credits. Combining all those aspects in a single instrument - as the Working Group and the Commission appeared to be doing - seemed less practical than attempting to produce separate rules for the different types of transaction.

32. The members of the Commission and of the Working Group might bear in mind, however, when distinguishing the environment of high-volume computer-assisted transactions, that there might be links in the chain that used paper, telex, fax and, indeed, human messengers - there might still be room for human beings in the banking system. Nevertheless, a distinction had to be made between electronic and non-electronic banking.

33. A fundamental change had occurred in electronic commerce generally, not merely in credit transfers, and the role of the central data manager was vital. The fund transfer system should be seen as a new, important and centrally involved party. A variety of elements in a transaction might have been undertaken in media other than electronics and the high volume of transactions often caused a variety of legal relationships to change. The Commission might wish to return to the fund transfer system as to a focal

(Mr. Burman, United States of America)

point that, in the long run, changed a great deal in the relations between a variety of banking participants and ultimately the originators of the transactions at one end and their beneficiaries at the other.

34. Mr. KOMAROV (Union of Soviet Socialist Republics) said that, in his delegation's opinion, there was no need nor any good reason to revise the consensus reached in the Working Group. Since, however, questions of interpretation had arisen, it might be advisable in the interests of clarity to state clearly - in article 2(b) concerning payment orders - that the provision in question applied to all types of payments made by teletransmission or electronic transmission.

35. Mr. SCHNEIDER (Germany) said that his delegation shared the United States representative's concern about the problems connected with electronic fund transfers. In his delegation's view, high-volume and inter-bank payments were problems of codified law and might be dealt with by special contracts. The Commission should realize that it was dealing with a very broad sphere of application; it would have to take into consideration the fact that there were still paper-based payment orders and it would also have to deal with consumer transactions.

36. In that connection, he said that it was not completely clear from his country's comments, especially the second subparagraph of paragraph 15 (A/CN.9/347, p. 31), that the Model Law should apply to consumer transactions but that national consumer law would amend the Model Law. He suggested that the insertion of the word "also" or "too" in the last clause of that subparagraph would remedy the situation. The inclusion of consumer transactions should be taken into consideration throughout the text. It was important, also, that the question of freedom of contract should be considered.

37. The CHAIRMAN said that the last subject mentioned would come up under article 3. In that connection, he drew attention to the Secretariat's comments on article 3 (A/CN.9/346, p. 25, para. 3).

38. Mr. LIM (Singapore) suggested, with reference to article 1(2), that, if the reference in the second line was to separate branches of the same bank in different States, the word "a" should be replaced by the words "the same".

39. Mr. BERGSTEN (Secretary of the Commission) said that the text as drafted was intended to refer to a single bank. If the proposed amendment would make the intention clearer without changing the substance, it would be a drafting matter. It might also facilitate translation into other languages.

40. The CHAIRMAN said that, while the Commission might wish to adopt that approach in respect of article 1, it should not be forgotten that article 2 contained other provisions concerning branches and offices of banks, while other articles also might be relevant.

Article 2

41. Mr. BERGSTEN (Secretary of the Commission), referring to the Secretariat's comments on article 2(a) (A/CN.9/346, pp. 12-13, paras. 4-9) reminded the Commission that there had been some problems of interpretation in the Working Group over the question whether certain credit transfers were international or not. In the case, for example, of a United States dollar transfer between two banks in the United Kingdom, one way of making the transfer would be for a payment order to be sent from bank A to bank B, both in the United Kingdom, for the credit of the account of the beneficiary; to reimburse bank B, bank A would then send a separate payment order to its correspondent bank in New York to credit the account of bank B; and bank B would receive the funds from bank A by credit to its account in New York. The direct payment order from bank A to bank B would remain within the United Kingdom and no payment order would cross a boundary from one State to another.

42. The transaction in question could be described in two ways. On the one hand, it could be argued that the reimbursement was a separate transaction which would clearly fall under the current text of the Model Law, while the payment order - or the bank A to bank B transaction - was strictly domestic in the United Kingdom. Conversely, it could be argued that the entire set of operations was a single transaction, namely, a credit transfer from bank A or its customer to bank B, part of that credit transfer being the reimbursement, which included a payment order passing from London to New York. According to the latter interpretation, the payment order from bank A to bank B in the United Kingdom would be governed by the Model Law, on the assumption that the United Kingdom had adopted the Model Law with its article 1 as currently drafted.

43. The CHAIRMAN said that the matter raised by the Secretary of the Commission would be discussed in connection with the second sentence of article 2(a) and, depending on the outome of that discussion, the Commission might have to return to article 1.

The meeting rose at 12.30 p.m.